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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CLARENCE JONATHON WOOD and HEIDI COLLINGWOOD,

Plaintiffs,

v.

SCOTTSDALE INDEMNITY CO.; and DOES 1 to 100, inclusive,

Defendants.

CASE NO. CV 08 3335 SBA

DEFENDANT SCOTTSDALE INDEMNITY COMPANY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Date : September 23, 2008
Time : 1:00 p.m.
Ctrm. : No. 3, 3rd Floor
Judge : Hon. Saundra Brown Armstrong

Selman Breitman LLP
ATTORNEYS AT LAW

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STATE STATUTES

I. INTRODUCTION

On May 25, 2002, Kimerly Holz Lindstrom ("Holz Lindstrom") was supervising Plaintiffs' daughter, minor Kayla Wood, while Ms. Wood was on an inner tube in the Trinity River. Holz Lindstrom was the live-in girlfriend of Ms. Wood's father, plaintiff Clarence Jonathan Wood. Ms. Wood drowned while using the inner tube. Plaintiffs filed wrongful death actions against Holz Lindstrom's parents, Ralph and Pamela Lindstrom ("the Lindstroms"), and Holz Lindstrom in Humboldt County Superior Court. Plaintiffs sued the Lindstroms because they owned the inner tube at issue, and as mentioned above, Holz Lindstrom was supervising Ms. Wood when the tragic incident occurred.

The Lindstroms obtained summary judgment in the wrongful death suits. Holz Lindstrom then settled with plaintiffs, who obtained money from primary insurance carriers, and then gave plaintiffs an assignment of rights to any proceeds available from the Scottsdale policy for a judgment which exceeded the settlement amount.

Defendant Scottsdale Insurance Company issued a Personal Umbrella Liability Policy to the Lindstroms. Plaintiffs assert that Holz Lindstrom is an insured under the Policy and that she assigned valid rights against Scottsdale to Plaintiffs.

The only way Plaintiffs recover anything from Scottsdale is if the Policy provides coverage to Holz Lindstrom. However, Scottsdale owes no coverage obligations to Holz Lindstrom because she is not an insured under the Policy. Moreover, even if Holz Linstrom is an insured, Scottsdale had no duties under its excess policy to defend, investigate or settle the underlying suits,

such that plaintiffs have no claim for breach of contract and bad faith as a matter of law. Finally, the Payment of Loss provision in the Policy limits the time within which plaintiffs may make a claim on the Policy, and plaintiffs failed to bring this suit within that time period. For all of these reasons, this motion to dismiss should be granted without leave to amend.

II. STATEMENT OF ISSUES TO BE DECIDED

1. Is an inner tube a "watercraft" as that term is defined by the Policy, such that Holz Linstrom is considered an insured under the policy?

2. If an inner tube is not a "watercraft,", is Holz Lindstrom a "relative" of the named insured as that term is defined by the Policy, such that Holz Lindstrom is considered an insured under the Policy?

3. If an inner tube is a "watercraft" as defined by the Policy:

   A. Was Holz Lindstrom "using" the inner tube as required to be an insured?

   B. Was other insurance available to Holz Lindstrom for Plaintiffs' claim which would preclude Holz Lindstrom from being an insured?

4. Can plaintiffs, as assignees under the Policy, state a claim for breach of contract or bad faith when Scottsdale had no primary duties to defend, investigate or settle the underlying wrongful death suits?

5. Does the Payment of Loss contractual time limitation preclude this claim against Scottsdale?

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III. FACTUAL BACKGROUND

A. The Inner Tubing Accident

Plaintiffs are the surviving parents of minor Kayla Wood. Scottsdale's Index Of Exhibits ("SIOE"), Exhibit "A", ¶ 3. On May 25, 2002, Kayla Wood went inner tubing in the Trinity River while in the custody of Holz Lindstrom, the live-in girlfriend of Plaintiff Clarence Jonathon Wood. SIOE Exhibit "A", ¶ 10; SIOE Exhibit "B", p. 3; SIOE Exhibit "C", pp. 1, 5.

The inner tube used by Kayla Wood was owned by the Lindstroms. SIOE Exhibit "B", p. 8; SIOE Exhibit "C", p. 6. Ralph Lindstrom allowed Kayla Wood to choose her inner tube and dropped her off, along with Holz Lindstrom and 3 other children, at the Trinity River. SIOE Exhibit "B", p. 8; SIOE Exhibit "C", p. 6. Holz Lindstrom was the only adult on the inner tubing trip. SIOE Exhibit "C", p. 6. While inner tubing, Kayla Wood got trapped in the roots of a downed tree (SIOE Exhibit "B", p. 1) and drowned. SIOE Exhibit "A", ¶ 10.

B. The Underlying Complaints And Resolution.

On July 12, 2002, Plaintiff Heidi Collingwood, Kayla Wood's mother, filed suit against Holz Lindstrom and the Lindstroms in Humboldt County Superior Court, case number DR020419, for wrongful death and exemplary damages. SIOE Exhibit "A", ¶ 11; SIOE Exhibit "D". On November 6, 2002, Plaintiff Wood, Kayla Wood's father, filed suit in Humboldt County Superior Court, case number DR020685, against Holz Lindstrom and the Lindstroms for General Negligence alleging that the defendants were negligently

responsible for Kayla Wood's death. SIOE Exhibit "A", ¶ 11; SIOE Exhibit "E".

On June 2, 2004, the Court in the underlying action entered judgment in favor of the Lindstroms and the underlying action thereafter proceeded against Holz Lindstrom only. SIOE Exhibit "A", ¶ 13. On or about April 24, 2006, Holz Lindstrom entered into a settlement with Plaintiffs, the terms of which included payment of $800,000 by underlying insurer Hartford Casualty Company and other insurer Foremost Insurance Company for their primary insurance policy limits on behalf of Holz Lindstrom, in exchange for a covenant by Plaintiffs not to execute upon any judgment in excess of that amount against Holz Lindstrom, and an assignment from Holz Lindstrom to plaintiffs of any claims she might have against other insurers (including Scottsdale. SIOE Exhibit "A", ¶¶ 5, 16, 18. The settlement agreement also stated that plaintiffs' total damages would be determined by the court. Id.

On August 30, 2006, the court determined damages to be $5 million plus recoverable costs. SIOE Exhibit "A", ¶ 19; SIOE Exhibit "F". Plaintiffs filed this action against Scottsdale on May 23, 2008 in an attempt to recover that judgment. SIOE Exhibit "A".

C. The Scottsdale Policy

Scottsdale Indemnity Company issued Policy No. PUI0020229, a "Personal Umbrella Liability Policy," to Ralph L. and Pamela W. Lindstrom, effective May 31, 2001 to May 31, 2002. SIOE Exhibit "A", ¶ 5; SIOE Exhibit "H". The Policy's Schedule of Underlying Insurance identifies Hartford Casualty Insurance as the

underlying insurance carrier for comprehensive personal liability for homeowners. SIOE Exhibit "H". The Policy states limits of liability of $1,000,000 each occurrence for bodily injury, personal injury, and property damage liability coverage. Id. The Policy states under Coverage A - Excess Bodily Injury and Property Damage Liability that Scottsdale will pay on behalf of the insured the amount of ultimate net loss, which the insured becomes legally obligated to pay:

> 1) in excess of the underlying limits (whether collectible or not) because of bodily injury, personal injury, or property damage to which this policy applies, caused by an occurrence; or
>
> 2) in excess of the retained limit because of bodily injury, personal injury, or property damage to which this policy applies, caused by an occurrence which is not covered by or which is not required to be covered by the underlying insurance.

SIOE Exhibit "H". In this case, paragraph (1) applies because underlying limits were collected by Hartford, as discussed above.

The Policy then provides in relevant part:

> III. DEFENSE AND SETTLEMENT
>
> A. With respect to occurrences which are covered under Coverage A of this policy but which are not covered or required to be covered by the underlying insurance, the Company, if no other insurer has an obligation to do so, shall defend any suit against the insured seeking damages on account of bodily injury, personal injury, or property damage, even if any of the allegations of the suit are groundless, false, or fraudulent; and the Company shall have the right to make such investigation and settlement of any claims or suit as it deems expedient.
>
> B. Except as specifically provided under A. above, the Company shall have no duty or obligation to assume the responsibility for the investigation, settlement, or defense of:

> 1. any claim made or suit brought against the insured under Coverage A;
>
> . . .
>
> but the Company shall have the right and shall be given the opportunity to investigate and to be associated in the control of any claim or suit which may, in the Company's opinion, create liability on the part of the Company under the terms of this policy.
>
> C. The Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the Company's liability has been exhausted by the payment of judgments or settlements.
>
> SIOE Exhibit "H" (emphasis added).

In this case, part B of the Defense and Settlement provision applies because the subject occurrence was covered by underlying insurance, as discussed above.

The Policy also contains the following Persons Insured provision:

> VI. PERSONS INSURED
>
> A. Each of the following is an insured under Coverage A to the extent set forth below:
>
> 1. With respect to automobiles or watercraft to which this policy applies:
>
> . . .
>
> c. Any of the following, while using the automobile or watercraft owned by or in the care of the named insured;
>
> (i) Any person using an automobile or watercraft with the permission of the named insured and for the purposes intended by the named insured.
>
> (ii) Any person or organization legally responsible for the use of such automobile or watercraft, but only if no

other insurance of any kind is available to that person or organization for such liability.

. . .

3. Except as provided under (1) and (2) above:

. . .

b. Any relative.

SIOE Exhibit "H" (emphasis added).

The Policy also includes the following relevant Conditions:

E. Action against the Company

1. No action shall lie against the Company under Coverage A unless, as a condition precedent thereto

. . .

b. The insured shall have paid or shall have become legally obligated to pay the full amount of the underlying limits;

. . .

c. Any applicable retained limit (self-insured retention) shall have been paid by or on behalf of the insured;

d. The amount of the insured's obligation to pay ultimate net loss shall have been finally determined.

. . .

F. Payment of Loss

. . .

3. Any claim against the Company by the insured under either Coverage A or Coverage B of this policy shall be made within twelve months after the insured:

(a) pays or becomes legally obligated to pay an amount of ultimate net loss within [Scottsdale's] limit of liability under Coverage A[ ].

Id. Finally, the Definitions Section of the Policy defines the following relevant terms:

> "Insured" means any person or organization qualifying as an insured in the "Persons Insured" provision of this policy. The insurance afforded applies separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the Company's liability;
>
> "Relative" means any person related to the named insured by blood, adoption, or marriage (other than the spouse of the named insured) who is a resident of the named insured's household.
>
> "Ultimate Net Loss" means the sum actually paid as damages, as determined by:
>
> (1) a judgment against the insured in a suit on the merits, or
>
> (2) as settlement of a claim or suit with the prior written consent of the Company,
>
> Less all recoveries and salvages; but "ultimate net loss" does not include:
>
> (a) interest on judgments, or
>
> (b) investigation, settlement, and legal expenses, including taxed court costs and premiums on bonds;
>
> "Underlying Insurance" means the insurance policies scheduled in Item 7 of the Declarations; "use", "uses", "used", and "using" mean maintaining, entrustment to others, operating, loading, or unloading.
>
> "use", "uses", "used", and "using" mean maintaining, entrustment to others, operating, loading, or unloading.
>
> "watercraft" means any craft, boat, vessel, or ship designed to transport persons or property on water.

Id. (emphasis added).

IV. STANDARD OF REVIEW

A. Motions To Dismiss

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a claim. Where plaintiff can prove no set of

facts in support of his claim entitling him to relief, the claim should be dismissed. De La Cruz v. Tormey (9th Cir. 1978) 582 F.2d 45, 48. Where an affirmative defense or other bar to relief is apparent from the face of the complaint, the claim should also be dismissed. Imbler v. Pachtman (1976) 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984. In making this determination, a court (1) construes the complaint in the light most favorable to the plaintiff, (2) accepts the well-pleaded factual allegations as true, and (3) determines whether the plaintiff can prove any set of facts to support a claim that would merit relief. Cahill v. Liberty Mutual Ins. Co. (9th Cir. 1996) 80 F.3d 336, 337-338.

Courts must also consider documents incorporated into the complaint by reference and matters of which a court may take judicial notice. Tellabs, Inc. v. Makor Issues & Rights, Ltd. (2007) 127 S.Ct. 2499, 2509.

B. Policy Interpretation

The burden is on the alleged insured (or her assignees) to make a prima facie showing that the third party claim falls within the insuring provisions of the policy. Aydin Corp. v. First State Ins. Co. (1998) 18 Cal.4th 1183, 1188. Thus, plaintiffs have the burden of proving that their assignor, Holz Lindstrom, is an insured under her parents' policy, a burden they will be unable to meet.

The interpretation of an insurance policy is a question of law. Waller v. Truck Ins. Exch., Inc. (1995) 11 Cal.4th 1, 18. "Clear and explicit" policy language governs. Bank of the West v. Sup.Ct. (1992) 2 Cal.4th 1254, 1264. Where the policy is clear and unequivocal, the only thing the insured may "reasonably

expect" is the coverage afforded by the plain language of the mutually agreed-upon terms. Sarchett v. Blue Shield of Calif. (1987) 43 Cal.3d 1, 15.

Unambiguous policy language cannot be challenged because the insured allegedly misunderstood its meaning: "Under the objective test of contract formation, a 'meeting of the minds' is unnecessary. A party is bound, even if he misunderstood the terms of a contract and actually had a different, undisclosed intention." Atlas Assur. Co., Ltd. v. McCombs Corp. (1983) 146 Cal.App.3d 135, 144.

To construe words in an insurance policy in their "ordinary and popular sense," courts often utilize dictionary definitions. Scott v. Continental Ins. Co. (1996) 44 Cal.App.4th 24, 29. A court may also use its own knowledge of common usage to determine the meaning of words in an insurance policy. MacKinnon v. Truck Ins. Exch. (2003) 31 Cal.4th 635, 654. The words in an insurance policy are understood in their "common sense." Strained and illogical interpretations are rejected. Bank of the West, supra, at 1276.

An alleged ambiguity in policy language cannot be based on a strained or grammatically incorrect interpretation of the policy language: "Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists." Reserve Ins. Co. v. Pisciotta (1982) 30 Cal.3d 800, 807. An insurance policy provision is only considered ambiguous when it is capable of two or more constructions, both of which are reasonable. Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co. (1993) 5 Cal.4th 854, 867.

As will be shown below, the plain and unambiguous language of the Policy, construed in its ordinary and popular sense, shows that Holz Lindstrom is not an insured under the Policy. Even if she is an insured, the excess policy issued by Scottsdale did not require it to defend, investigate or settle the underlying wrongful death suits until a judgment was entered, which means there can be no claim for breach of contract or bad faith as a matter of law. Moreover, plaintiffs, as assignees of Holz Lindstrom, are bound by the twelve-month time limitation under the Policy, which they failed to meet. For all of these reasons, Plaintiffs cannot state an assigned claim for breach of contract or bad faith against Scottsdale as a matter of law, and this motion to dismiss should be granted without leave to amend.

V. LEGAL ANALYSIS

A. Plaintiffs May Recover From Scottsdale Only If Holz Lindstrom Is An Insured Under The Policy.

In order to transfer rights to a third party, a party must first be entitled to the right being transferred. See Clemmer v. Hartford Ins. Co. (1978) 22 Cal.3d 865, 889.

Here, Plaintiffs are not insureds under the Policy and their recovery turns on whether they properly obtained rights against Scottsdale. In order for Holz Lindstrom to assign rights to Plaintiffs, she first had to be entitled to those rights - namely, she must be an insured to assign recoverable rights to Plaintiffs.

B. Holz Lindstrom Is Not An Insured Under The Policy.

The Policy is incorporated by reference in paragraph 5 of the Complaint and the court should consider its terms in deciding

the motion to dismiss. Tellabs, 127 S.Ct. at 2509. As cited above, the Policy defines an insured in pertinent part as follows:

> VI. PERSONS INSURED
>
> A. Each of the following is an insured under Coverage A to the extent set forth below:
>
> 1. With respect to automobiles or watercraft to which this policy applies:
>
> . . .
>
> c. Any of the following, while using the automobile or watercraft owned by or in the care of the named insured;
>
> (i) Any person using an automobile or watercraft with the permission of the named insured and for the purposes intended by the named insured.
>
> (ii) Any person or organization legally responsible for the use of such automobile or watercraft, but only if no other insurance of any kind is available to that person or organization for such liability.
>
> . . .
>
> 3. Except as provided under (1) and (2) above:
>
> . . .
>
> b. Any relative.

Thus, in order for Holz Lindstrom to be considered an insured under the Policy, Holz Lindstrom must either be a "relative" of the named insured, as that term is defined by the Policy; or (1) the inner tube must be a "watercraft" as that term is defined by the Policy , (2) the "watercraft" must be one "to which this policy applies", and (3) Holz Lindstrom must have been either "using" the "watercraft", or no other insurance was

available to Holz Lindstrom. Plaintiffs cannot meet their burden of proving any of the above, such that Holz Lindstrom is not an insured under the Policy, and plaintiffs' claims fail.

1. Holz-Lindstrom Was Not A "Relative" at the Time of the Accident As That Term Is Defined By The Policy

If the inner tube is not a "watercraft," which it is not as discussed below, then Holz Lindstrom is not a person insured under the policy, because she is not a "relative" of the Lindstroms as defined by the Policy. While she is blood-related to Ralph L. Lindstrom, a named insured, she did not reside with the Lindstroms at the time of the accident; rather, she lived with plaintiff Clarence Jonathon Wood. SIOE Exhibit "B", p. 3; SIOE Exhibit "C", pp. 1, 5. The Policy requires Holz Lindstrom to reside with the Lindstroms at the time of the accident, and she did not. Therefore, she is not an insured under Section 3(b).

2. An Inner Tube Is Not A "Watercraft" As Defined By The Policy.

The only other way Holz Lindstrom is an insured under the Policy is if the subject inner tube is a "watercraft." As mentioned above, the Definitions Section of the Policy defines the term "watercraft" to mean "any craft, boat, vessel, or ship designed to transport persons or property on water." An inner tube is not a "craft," "boat, "vessel" or "ship" within the common meaning of those terms.

Regarding the term "craft", the doctrine of *ejusdem generis* provides that "where general words follow an enumeration of

persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." Cahill, 80 F.3d at 338, n. 2. Under this doctrine, courts will look to the terms "boat," "vessel" and "ship" in order to give meaning to the word "craft," and an inner tube clearly does not fall within the same class as "boat," "vessel," or "ship".

No case authority holds that an inner tube is a watercraft. However, case law shows that a "watercraft" has been defined to include ocean carrier vessels (Yang Machine Tool Co. v. Sea-Land Service, Inc. (9th Cir. 1995) 58 F.3d 1350); cargo vessels (Price v. Zim Israel Navigation Co., Ltd. (9th Cir. 1980) 616 F.2d 422); boats (California Cas. Ins. Co. v. Northland Ins. Co. (1996) 48 Cal.App.4th 1682; Ohio Cas. Inc. Co. v. Hartford Acc. and Indemn. Co. (1984) 148 Cal.App.3d 641; Reserve Ins. Co. v. Pisciotta (1982) 30 Cal.3d 800); barges (Sentry Select Ins. Co. v. Royal Ins. Co. of Am. (9th Cir. 2007) 481 F.3d 1208; Consolidated American Ins. Co. v. Mike Soper Marine Services (9th Cir. 1991) 951 F.2d 186; Upper Columbia River Towing Co. v. Maryland Cas. Co. (1963) 313 F.2d 702); and skiffs (In the Matter of the Complaint of McLinn (1984) 744 F.2d 677). Inner tubes simply are not in the same category as ocean carrier vessels, cargo vessels, boats, barges, or skiffs.

In addition, as cited above, the dictionary meaning of "craft", as well as the terms "boat," "vessel" and "ship" is relevant to determine whether a reasonable person would consider

an "inner tube" to be a "watercraft" within the meaning of the Policy. The dictionary definition of "craft" is "a boat, ship, or aircraft." SIOE Exhibit "G". An inner tube does not fit any of these definitions; it is not a boat, ship, or aircraft. Rather, "inner tube" is defined as "a flexible airtight hollow ring, usu. made of rubber, inside a pneumatic tire for holding compressed air." SIOE Exhibit "G".

In contrast, the dictionary definition of "boat" is "a relatively small, usually open craft of a size that might be carried aboard ship; an inland vessel of any size; ship or submarine." SIOE Exhibit "G". The dictionary definition of "vessel" is "Naut. A craft, esp. one larger than a rowboat, designed to navigate on water." SIOE Exhibit "G". And finally, the dictionary definition of "ship" is "a vessel of considerable size for deep-water navigation. A sailing vessel having three or more square-rigged masts." SIOE Exhibit "G".

The definition of "inner tube" does not encompass a means of transportation over water, which is the common understanding of the purpose of a "watercraft" and which is part of the definition of "watercraft" in the Policy. An inner tube is part of a tire, not a "craft." To find that an "inner tube" is a "watercraft" under the Policy would be equivalent to finding that a piece of plywood, a kickboard, or a floating chair are "watercraft," and such an outcome would be absurd. Stated another way, if an accident occurred with an inner tube in a swimming pool, where inner tubes are often used, it is hard to conceive of any reasonable person calling it a "watercraft."

Moreover, the "Persons Insured" provision at issue provides

permissive use coverage for "automobiles" and "watercraft." It would be illogical to define someone as having permissive use of an inner tube in the way a reasonable person would consider having permissive use of an "automobile." In short, it makes no sense to treat "automobiles" and "inner tubes" similarly, which is the strained construction the court would have to exercise in order to find that the inner tube at issue in this case is a "watercraft."

The rules of policy interpretation require the court to reject any "strained and illogical interpretation" of "watercraft". Bank of the West, supra, at 1276. Therefore, Plaintiffs are unable to meet their burden of proving that Holz Lindstrom is an insured, and Scottsdale's motion to dismiss should be granted without leave to amend.

3. Even If An Inner Tube Is A "Watercraft", Holz Lindstrom Is Still Not An Insured.

Even if the inner tube is considered a "watercraft," Holz Lindstrom is not an insured because she was not "using" the inner tube and because she had other insurance available.

a. Even If An Inner Tube Is A "Watercraft", Holz Lindstrom Was Not "Using" The Inner Tube As That Term is Defined by the Policy.

In order for Holz Lindstrom to be an insured, she must have been "using" the "watercraft" at the time of the incident. Holz Lindstrom was not "using" the inner tube which was involved in Kayla Wood's death at the time of the incident. Rather, Kayla Wood was "using" the inner tube at issue. SIOE Exhibits "B" and "C".

"Using" is defined in the Policy as "maintaining,

entrustment to others, operating, loading, or unloading." Holz Lindstrom clearly was not maintaining, operating, loading or unloading the inner tube at the time of the incident. Rather, she was riding a different inner tube ahead of Kayla Wood. SIOE Exhibits "B" and "C."

Holz Lindstrom also did not "entrust" the inner tube to Kayla Wood. Entrust means "'[t]o give over to another something after a relation of confidence has been established. To deliver to another something in trust or to commit something to another with a certain confidence regarding his care, use or disposal of it.'" Mercedes-Benz Credit Corp. v. Johnson (2003) 110 Cal.App.4th 53, 59. Holz Lindstrom did not deliver the inner tube to Kayla Wood in any relation of confidence. She remained with Kayla Wood and the inner tube and was the responsible adult present at the site. SIOE Exhibits "B" and "C." The fact that Kayla Wood was "using" the inner tube under the supervision of Holz Lindstrom means that Holz Lindstrom could not have been "entrust[ing]" the inner tube to Kayla Wood. Holz Lindstrom did not "entrust" the inner tube to anyone as she remained present to be responsible for the children. SIOE Exhibits "B"and "C."

In short, Kayla Wood was "using" the inner tube, not Holz Lindstrom. As Holz Lindstrom did not entrust the inner tube to Kayla Wood, and she was clearly not maintaining, operating, loading or unloading the inner tube at the time of the incident, Holz Lindstrom was not "using" the inner tube as defined by the Policy. Holz Lindstrom therefore does not qualify as an insured on that basis.

b. Even If An Inner Tube Is A "Watercraft", Holz Lindstrom Had Other Insurance Available For Plaintiffs' Claim.

Holz Lindstrom also would not qualify as an "insured" under definition c.(ii), because that provision grants insured status "only if no other insurance of any kind is available to that person or organization for such liability." SIOE, Exhibit "H." Both Foremost Insurance Company and Hartford Insurance Company paid their policy limits totaling $800,000 to the Plaintiffs on Holz Lindstrom's behalf. SIOE Exhibit "A", ¶ 16. Accordingly, there was other insurance that applied to Holz Lindstrom's liability, and she does not qualify as an "insured" under definition c.(ii) for this reason.

The California Court of Appeal has upheld a similar limitation on coverage when the permissive user's own policy had the minimum limits required for automobile liability coverage under California law. Cal-Farm Ins. Companies v. Fireman's Fund American Ins. Companies (1972) 25 Cal.App.3d 1063, 1066. Based on the Cal Farm case and the above discussion, this Court should find that Scottsdale has no duty under its personal umbrella policy to provide permissive user coverage to Holz Lindstrom, even assuming that the "inner tube" is found to be a "watercraft." The Policy's limitation on permissive user coverage for watercraft, i.e., that it applies "only if no other insurance of any kind is available to that person or organization for such liability" is unambiguous and enforceable and precludes insured status to Holz Lindstrom.

C. Even If Holz Lindstrom Is An Insured Under The Policy, Scottsdale Had No Duty To Defend, Investigate Or Settle The Underlying Actions, So There Can Be No Valid Claim for Breach Of Contract Or Bad Faith As A Matter Of Law

The Policy states in the Defense and Settlement section that if underlying insurance covers the loss, Scottsdale has "no duty or obligation to assume the responsibility for the investigation, settlement, or defense of … any claim made or suit brought against the insured[.]" SIOE Exhibit "H". In this case, underlying insurer Hartford paid part of a settlement on Holz Lindstrom's behalf. As such, Scottsdale had no duty to defend, investigate or settle the claim on behalf of Holz Lindstrom. See Diamond Heights Homeowners Assn. v. National American Ins. Co. (1991) 227 Cal.App.3d 563, 577.

No action lies against Scottsdale until "[t]he amount of the insured's obligation to pay ultimate net loss shall have been finally determined." SIOE Exhibit "M". Thus, Scottsdale had no duties to any insured until the judgment was entered against Holz Lindstrom.

Therefore, plaintiffs can state no claim for breach of contract or bad faith against Scottsdale as a matter of law. At best, plaintiffs have a possible claim as a judgment creditor under California Insurance Code section 11580.

D. Even If Holz Lindstrom Is An Insured Under The Policy, Plaintiffs Have Not Brought This Claim Against Scottsdale Within The Contractual Time Limitation.

The Policy contains a Payment of Loss provision under the Conditions section of the Policy which contains a limitation of time to make a claim against Scottsdale. That provision states in relevant part:

> Any claim against the Company by the insured under either Coverage A or Coverage B of this policy shall be made within twelve months after the insured:
>
> (a) pays or becomes legally obligated to pay an amount of ultimate net loss within [Scottsdale's] limit of liability under Coverage A.

California has long recognized the right of an insurer to limit the time in which an insured may make a claim against the insurer. See Fageol Truck & Coach Co. v. Pacific Indem. Co. (1941) 18 Cal.2d 748, 753; C & H Foods Co. v. Hartford Ins. Co. (1984) 163 Cal.App.3d 1055, 1064. These provisions are enforceable as long as they are clearly stated in the policy and do not shorten the time to an unreasonable time period. Ibid. Such policy-made time limitations are applicable in bad faith actions as well as actions on contract. See Velasquez v. Truck Ins. Exch. (1991) 1 Cal.App.4th 712, 719-21.

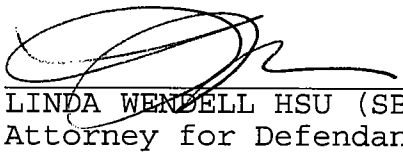
The alleged insured, Holz Lindstrom, had judgment entered against her for $5 million plus costs on August 30, 2006. SIOE Exhibit "F". Plaintiffs, as assignees to Holz Lindstrom's rights, did not bring this action against Scottsdale until well over twelve months later, on May 23, 2008. SIOE Exhibit "A". This is well beyond the twelve month period from the date of Holz Lindstrom's payment obligation. As such, this Court should grant Scottsdale's motion to dismiss without leave to amend.

VI. CONCLUSION

For the above-stated reasons, Scottsdale respectfully requests that the operative complaint be dismissed without leave to amend.

DATED: July 29, 2008

SELMAN BREITMAN LLP

By: 

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ATTORNEYS AT LAW

PROOF OF SERVICE

Clarence Jonathon Wood and Heidi Collingwood v. Scottsdale Indemnity Company

United States District Court Northern District of California Case No. CV 08 3335 SBA

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 33 New Montgomery, Sixth Floor, San Francisco, CA 94105. On **July 29, 2008**, I served the following document(s) described as **DEFENDANT SCOTTSDALE INDEMNITY COMPANY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT** on the interested parties in this action as follows:

by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

David P. Dibble, Esq. Law Offices of David P. Dibble 123 F Street, Suite D Eureka, CA 95501 (707) 444-9330	Attorneys For Plaintiff CLARENCE JONATHON WOOD
Zachary E. Zwerdling, Esq. Law Office Of Zachary E. Zwerdling 123 F Street, Suite C Eureka, CA 95501 (707) 445-9628	Attorneys For Plaintiff HEIDI COLLINGWOOD

☒ **BY MAIL:** By placing a true copy thereof in a sealed envelope addressed as above, and placing it for collection and mailing following ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence, pleadings, and other matters for mailing with the United States Postal service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY OVERNIGHT COURIER:** I caused the above-referenced document(s) to be delivered to FEDERAL EXPRESS for delivery to the addressee(s).

☐ **BY E-MAIL**: I transmitted a copy of the foregoing documents(s) via e-mail to the addressee(s).

☐ **BY FAX**: I transmitted a copy of the foregoing documents(s) via telecopier to the facsimile numbers of the addressee(s), and the transmission was reported as complete and without error.

☐ **BY PERSONAL SERVICE:** I personally delivered such envelope by hand to the offices of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **July 29, 2008**, at San Francisco, California.

Laura Talesnik
LAURA TALESNIK

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